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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
)
Plaintiff-Respondent,)
)
vs.)
)
KELVIN TAYLOR,)
)
Defendant-Appellant.)
)

CASE No. _____

APPELLANT'S BRIEF

Appeal from the Judgment of the
Fourth District Court of Utah County
Honorable J. Robert Bullock, Judge

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KELVIN TAYLOR,)	
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APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment of a guilty verdict entered in the Fourth Judicial District Court, in and for Utah County, State of Utah, for the crime of Theft, a second degree felony.

DISPOSITION IN THE LOWER COURT

Defendant was convicted on the 11th day of January, 1978 on theft of a firearm in violation of U.C.A. § 76-6-404 and U.C.A. §76-6-412. Defendant was sentenced to a term of one (1) year to fifteen (15) years in the Utah State Prison. The matter at trial was heard before a jury.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of his conviction, or failing that, a new trial.

STATEMENT OF FACTS

The defendant was charged with exercising unauthorized control over a firearm belonging to John Myers in violation of U.C.A. § 76-6-404 and § 76-6-412. The date of the charged violation was September 9, 1977.

The State called Mark Myers; John F. Myers; John Perrero; and Utah County Sheriff Deputy Frank Wall. Defendant called Lamar Langdon, police officer from Spanish Fork City, State of Utah; Kenneth Lynn Mower; and the defendant, Kelvin Taylor.

Mark Myers stated that he was acquainted with the defendant, Kelvin Taylor. He also stated how he had met the defendant.

"DIRECT EXAMINATION"

- Q Would you please state your name? BY MR. WEIGHT
- A Mark Myers.
- Q Where are you presently staying, Mr. Myers?
- A Utah State Penitentiary, B-Block 207.
- Q Are you acquainted with Kelvin Taylor?
- A Yes, sir.
- Q When did you first meet him?
- A I met him at a 90-day diagnostic unit, Utah State Penitentiary.
- Q Do you remember when that was?
- A It was the first part of March.

MR. CARTER: Your Honor, may I object?

THE COURT: Just a minute.

MR. CARTER: I'd at this time object and reaffirm my motion for objection on the basis of my former motion.

THE COURT: Yes, you may. The record may so show. You have a standing objection, and your objection is overruled. You may proceed.

Q (By Mr. Weight) By date do you know approximately the day or month when you met Mr. Taylor?

A I don't know the exact date, but I went out to 90-Day diagnostic unit.

Q Okay. Were you in the Halfway House about the 6th day of September last year?

A Yes, that's the day I left from the Halfway House."

This line of questioning was only preceded by the prosecutor's opening statement by Mr. Weight:

"This case involves the theft of a rifle, the rifle was a 30-06. It occurred on the 9th day of September, 1977. Prior to that time the defendant was an acquaintance of a Mark Myers. Mark Myers is presently in the Utah State Prison. At the time of September 6th and prior to that time he was in the Halfway House on a rehabilitative program from the prison, and he was given opportunities through

the Halfway House to have privileges to leave the facility and work and his restraint was not quite as great as it would be as if he were at the prison itself. On the 6th day of September or about that day Mr. Myers, who knew the defendant because they had been together in that halfway house facility at a time prior and had met there, left the Halfway House and did not return as he was supposed to do."

Based upon such statements by the prosecutor, defense counsel moved for a mistrial. (T. page 7-8)

Mark Myers further testified:

Q "Now what do you mean your plans changed when you met girls?

A Well, when I went down to pick up Kelvin to go up and do some hunting, he had two girls and one guy that ran away from North Dakota, and I completely changed plans from going up hunting. I took the people that slept outside and took them up to my house in Farmington and fed them, gave them a nice hot shower, and then we -- then I got in trouble with the Halfway House and that's when we decided to run."

Again, Mr. Myers commented about certain runaways:
(T. 13)

A "Yes. I gave the runaways a hot meal and a hot shower and a decent bed to sleep in."

Mr. Myers then testified as to the defendant stealing gas for Mr. Myer's car. (T. 15)

A "The next day we went downtown, and we were running pretty low on gas, so Kelvin -- the defendant went out and siphoned gas for us and put it in my car, and that got us around."

Mr. Myers then testified as to a theft of a citizen band radio and a 2,000 watt candle power spot light. (T.18)

Q After you discovered that the rifle was missing, did you contact the defendant?

A No, not when I found out the rifle was missing. The first thing I did, I went to Springville to the particular pawn shop.

Q Why did you do that?

A Because when I first discovered the c.b. was missing, Kelvin Taylor told me that he left, he had a flat tire in Santaquin Canyon, and he left my car and went to town to get a new tire for it, and he said when he got back the c.b. was stolen.

Q Okay. Why did you go to the Tip Top?

A I went to the Tip Top because I wasn't very sure to myself that it was stolen, and because I knew it was a pawn shop, because I ran low on money, and I had a fuzz buster and a 100 watt -- 110 watt leaner for my c.b. that I owned myself and paid for. I took it in there and pawned it off myself, and then went out and put gas in my car, then we took Holly and Kelvin over to Provo and got something to eat. And then when I went down there this time I asked the lady --

Q Let me stop you right there. When you say "this time", what time are you --

A I'm talking about the time I found out the c.b. was missing.

Q Okay, go ahead.

A I walked in there, and there was a lady behind the counter, and I says, "Do you mind if I look in your stockroom and see if my stolen material is in here?" And she first refused. And I says, "Well, look, I'll put my hands in the air. I won't touch nothing. I just want to know to myself if it's in here." Then she finally agreed, and I walked in there with my hands in the air, and I looked over to my right and my dad's 06 was laying there and my c.b. and my 2,000 candle watt power spot light was there, and I looked at the ticket and it said "Kelvin Taylor". By that time I was so mad I couldn't even talk."

Detective Sargeant Frank Wall, Utah County Sheriff's Department, later took the stand and testified. Mr. Wall testified as to the defendant being on probation and other charges being investigated. (T.48-49)

A "Yes. I asked him, I said, "Kelvin, you realize that this would violate you, being in possession and doing this with the firearm?" And he said "Yes". I asked him if his probation officer had been notified, and he said, "No." So at that time we called his probation officer and talked with him.

Q Was that the substance of the conversation specifically about the rifle?

A Well, he agreed to, you know, if we could help him out in any way on any of the charges that he would provide us with some information as to the whereabouts of Mark Myers, the runaway from the Halfway House."

Officer Wall then testified as to the defendant being on parole and why he would want to violate his parole. (T.49)

A "We had talked about his being involved in the situation and I asked Mr. Taylor why he would want to violate his parole and take the chance again, and he indicated that Mr. Myers asked him to go down and sell these things to get food and that was the reason why he had sold these items."

Officer Wall then elaborated on the defendant being in prison and the possibility of going back to prison. (T.50)

"...And as we were heading into the jail itself he said, "Well, I guess this will put me back in prison." And I said, "Well, it looks like it. You probably should have thought about it a little more before you got involved with Mr. Myers"...

Officer Wall then testified as to his involvement with the defendant on previous occassion. (T. 50-51)

"...And I asked Kelvin, I felt pretty bad because I had helped him out in previous and I felt that he hadn't been honest to me..."

The State rested and the defendant Kelvin Taylor, through his counsel, moved for a mistrial on the basis of the prejudicial information above mentioned. (T.56)

ARGUMENT

POINT I: THE DEFENDANT'S MOTIONS FOR MISTRIAL SHOULD HAVE BEEN GRANTED AND EVIDENCE OF OTHER CRIMES OR CIVIL WRONGS SHOULD HAVE BEEN EXCLUDED FROM THE JURY'S CONSIDERATION.

The prosecuting attorney in his opening statement commented that the defendant had been in the Halfway House with one Mark Myers. Mr. Myers, upon questioning of the prosecuting attorney, stated that he had met the defendant at a 90-day Diagnostic Unit, Utah State Penitentiary.

The prosecutor even elicited the time that the defendant was in the Penitentiary, the first part of March. (T.10-11)

Mr. Myers again prejudiced the defendant by implicating the defendant with assisting and associating with runaways from North Dakota. (T.12) Mr. Myers related how the defendant had stolen some gas. (T.15) Thereafter, Mr. Myers re-

lated how the defendant had also stolen a citizen band radio and a spot light.

The prosecutor called Officer Frank Wall and elicited from that Officer that the defendant was on probation. (T.48); that the defendant was on parole (T.49); that the defendant had been in prison and would probably go back to prison (T.50) and that the defendant had been involved in other incidents involving violations of the law. (T.50)

Utah Rules of Evidence, Rule 55 provides:

"Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rule 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity."

In State v. Kazda, 14 U. 2d 266, 382 P. 2d 407 (1963) the defendant there was convicted of assault with intent to commit robbery and murder. The State called an FBI agent that had interviewed the defendant after the defendant had been arrested and incarcerated in Medford, Oregon. The agent stated that the defendant had informed him that he was with two other men when they had shot and killed the victim. The prosecutor further elicited from the agent that the defendant was incriminated in other crimes, including murder

occurring in other states, which the defendant denied to the agent. Further, that the defendant admitted being arrested for a robbery in Nebraska and that there were two outstanding warrants for the defendant's arrest in Nebraska.

The Court reversed the verdict and stated:

"We deem the foregoing to constitute prejudicial error. It implied that the defendant was implicated in other crimes, none of them proven, and could have no other effect than to degrade the defendant and give the jury the impression that he had a propensity for crime."

Also, State v. Dixon, 12 U. 2d 8, 361 P. 2d 412 (1961) where the defendant, on trial for robbery, was questioned concerning a criminal incident in which the defendant had been involved but not convicted. The Court found the incident to be immaterial to the matter before the Court.

In State v. Hartman, 101 U. 298, 119 P. 2d 112 (1941), the Court states that an attempt to get into evidence the prejudicial reference to another crime, such attempt might well be grounds for a mistrial not only on the grounds of prejudice, but as a proper expression of the Court's strong disapproval for such tactics.

In State v. Huggins, 18 U. 2d 219, 418 P. 2d 978 (1966) the State introduced in a prosecution for molesting two girls, evidence of another act by the defendant supposedly that same day with a ten (10) year old girl. There the Court was

shocked and stated that such evidence:

"...offends fair play and raises constitutional questions."

Evidence of other crimes or civil wrongs should not be brought into evidence for the purpose of disgracing the defendant nor for the purpose of showing a propensity to commit the crime charged. State v. Mason, (Utah 1975) 530 P 2d 795; State v. Schieving, (Utah 1975) 535 P. 2d 1232; State v. Kasai, 27 U. 2d 326, 495 P. 2d 1265 (1975); State v. Baran, 25 U. 2d 16, 474 P. 2d 728 (1970); and State v. Ahrens, 25 U. 2d 222, 479 P. 2d 786 (1971).

In People v. Velarde, (Colo. App. 1975) 541 P. 2d 107, the Colorado Court of Appeals found evidence that the defendant had been in prison, required reversal. There, the defendant, in a third degree felony burglary case, appeared as his own witness. His defense attorney inquired whether the defendant had been convicted of any felonies. The defendant stated that he had. Upon cross-examination, the prosecuting attorney inquired as to two other felonies in 1957 and 1967. The defendant stated that he had not been convicted. (In 1957 the defendant had been convicted of a juvenile offense. In 1967, the defendant had been convicted but such conviction was reversed with the case being retried.) Yet, the prosecutor asked the defendant about his incarceration in prison.

In that case, the court found:

"It is elementary that in a criminal trial to a jury, evidence of defendant's criminal activity, which is unrelated to the offense charged, is inadmissible when reference is made in the presence of the jury to such criminal activity, a mistrial is normally required..."

The Court further declared that the question regarding the defendant being incarcerated in prison to be especially objectionable. Similar to Officer Wall's testimony in the present case, a police officer in Velarde, (supra) testified that when he heard about the theft that he immediately "thought of the Valarde brothers." The Court stated that such testimony was prejudicial and should have been stricken.

Another case analagous to the present case is Van Gorham v. State, (Okla Cr. 1970) 475 P. 2d 187. In Van Gorham, the State called a police officer who was cross-examined as to an alleged confession by the defendant regarding an Oklahoma crime. The officer interjected in the answer that the defendant had stated that: "...he was on parole from Kansas." Further, the prosecuting attorney questioned the defendant's Father as follows:

Q "At that time was he (defendant) on parole from Kansas?"

The prosecutor asked the defendant's Mother the following:

Q "All right, has he ever given you any trouble in the past?"

A He has been in some trouble in the past, yes sir.

- Q What kind of trouble?
- A It was some trouble in Kansas.
- Q Well, in Kansas. Alright, what kind of trouble?
- A It was stealing some household goods out of a house.
- Q Was he convicted of that crime?
- A Yes, sir, he was.
- Q Was he sentenced by the Court?
- A Yes, sir.
- Q Do you know what that sentence was?
- A One to ten years, I believe, and suspended."

The testimony was elicited from the witness before the defendant took the stand and the Court found such testimony was clearly inadmissible and could serve no purpose at that time, but to prejudice the defendant. To admit the testimony of prior conviction before the defendant takes the stand in a two stage proceeding was "...error of the worst kind."

See also Eubanks v. State, (Alaska 1973) 516 P. 2d 726, where the prosecution introduced evidence of heroin use in a theft case. The Court there found the prejudicial effect of associating the defendant with heroin is great and required reversal.

CONCLUSION

Evidence that the defendant met Mr. Myers within the

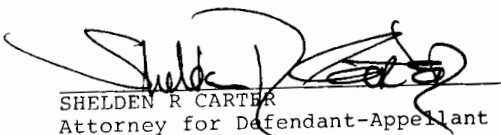
prison system was clearly of a prejudicial nature. No purpose can be contended that incarceration in a penal institution is relevant to show absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity. Such evidence does no more than degrade the defendant and give the jury the impression that he had a propensity to commit the crime.

Evidence that the defendant had been on probation and parole is inadmissible in that it is not relevant to prove a material fact. Evidence that the defendant had siphoned gasoline without permission has no relevancy to material issues of the case; nor does the fact that he assisted run-aways from North Dakota.

When culminated into a whole, the admission of the evidence relating to incarceration in prison, parole, probation, theft, and assisting runaways, does such a prejudicial damage to the defendant, it requires a mistrial, or at the minimum an exclusion of that evidence.

DATED this 15th day of May, 1978.

RESPECTFULLY SUBMITTED,


SHELDEN R CARTER
Attorney for Defendant-Appellant